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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOSEPH STIGAR, individually and on  
behalf of all others similarly situated,

Plaintiff,

vs.

DOUGH DOUGH, INC. et al.,

Defendants.

No. 2:18-cv-00244-SAB

STATEMENT OF INTEREST OF  
THE UNITED STATES OF  
AMERICA

MYRRIAH RICHMOND and  
RAYMOND ROGERS, individually and  
on behalf of all others similarly situated,

Plaintiffs,

vs.

BERGEY PULLMAN INC. et al.,

Defendants.

No. 2:18-cv-00246-SAB

STATEMENT OF INTEREST OF  
THE UNITED STATES OF  
AMERICA

ASHLIE HARRIS, individually and on  
behalf of all others similarly situated,

Plaintiff,

vs.

CJ STAR, LLC et al.,

Defendants.

No. 2:18-cv-00247-SAB

STATEMENT OF INTEREST OF  
THE UNITED STATES OF  
AMERICA

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**OTHER AUTHORITIES:**

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## INTEREST OF THE UNITED STATES

The United States respectfully submits this notice pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal court.

The United States enforces the federal antitrust laws and has a strong interest in their correct application. The United States has a particular interest in the standard for judging the legality of “no-poach agreements”—that is, agreements among employers not to solicit or hire each other’s employees—under Section 1 of the Sherman Act, 15 U.S.C. § 1. The United States has repeatedly enforced the antitrust laws against no-poach agreements, *see United States v. Knorr-Bremse AG*, No. 18-cv-747, Final Judgment, Doc. 19 (D.D.C. July 11, 2018); *United States v. eBay, Inc.*, No. 12-cv-5869, Final Judgment, Doc. 66 (N.D. Cal. Sept. 2, 2014); *United States v. Adobe Sys., Inc.*, No. 1:10-cv-1629, Final Judgment, Doc. 17 (D.D.C. Mar. 18, 2011); *United States v. Lucasfilm Ltd.*, No. 1:10-cv-2220, Final Judgment, Doc. 6-1 (D.D.C. May 9, 2011), and recently filed a statement of interest on the issue, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-mc-798, Doc. 158 (W.D. Pa. Feb. 8, 2019).

Here, the United States describes the legal standards governing whether a plaintiff has stated a claim that a no-poach agreement in a commercial-franchise relationship violates federal antitrust law.

## STATEMENT

### **I. Legal Background**

Section 1 of the Sherman Act declares “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, . . . illegal.” 15 U.S.C. § 1. Restraints subject to this prohibition are generally categorized as either

1 “horizontal” or “vertical.” Restraints imposed by agreements between “competitors  
2 on the way in which they will compete with each other” are horizontal. *NCAA v. Bd.*  
3 *of Regents of Univ. of Okla.*, 468 U.S. 85, 99 (1984). Restraints “imposed by  
4 agreement between firms at different levels of distribution” (such as manufacturers  
5 and distributors) on matters over which they do not compete are vertical. *Ohio v. Am.*  
6 *Express Co.*, 138 S. Ct. 2274, 2284 (2018) (quoting *Bus. Elecs. Corp. v. Sharp Elecs.*  
7 *Corp.*, 485 U.S. 717, 730 (1988)).

8 The legality of many restraints is “analyzed under a ‘rule of reason,’ according  
9 to which the finder of fact must decide whether the questioned practice imposes an  
10 unreasonable restraint on competition, taking into account a variety of factors,  
11 including specific information about the relevant business, its condition before and  
12 after the restraint was imposed, and the restraint’s history, nature, and effect.” *State*  
13 *Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). “[N]early every . . . vertical restraint . . .  
14 should be assessed under the rule of reason.” *Am. Express*, 138 S. Ct. at 2284.

15 Yet the “rule of reason does not govern all restraints.” *Leegin Creative Leather*  
16 *Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Rather, some “types of  
17 restraints” have “such predictable and pernicious anticompetitive effect, and such  
18 limited potential for procompetitive benefit, that they are deemed unlawful *per se*.”  
19 *Khan*, 522 U.S. at 10. By “treating categories of restraints as necessarily illegal,” the  
20 *per se* rule “eliminates the need to study the reasonableness of an individual restraint.”  
21 *Leegin*, 551 U.S. at 886; *see United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir.  
22 1991) (similar). “Typically only ‘horizontal’ restraints . . . qualify as unreasonable *per*  
23 *se*.” *Am. Express*, 138 S. Ct. at 2283-84.

Moreover, under the “ancillary restraints doctrine,” a horizontal agreement ordinarily condemned as per se unlawful is “exempt from the per se rule” if it is ancillary to a separate, legitimate venture between the competitors. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.). Ancillary restraints are subject to the rule of reason. *E.g., id.*

“To be ancillary,” an “agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction,” and reasonably necessary to “make the main transaction more effective in accomplishing its purpose.” *Id.* at 224, 227; *accord Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 335-38 (2d Cir. 2008) (Sotomayor, J., concurring); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985); *L.A. Mem’l Coliseum Comm’n v. NFL*, 726 F.2d 1381, 1395 (9th Cir. 1984); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265, 269 (7th Cir. 1981); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (Taft, J.), *aff’d*, 175 U.S. 211 (1899); Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 705-09 (1998); Robert H. Bork, *Ancillary Restraints and the Sherman Act*, 15 Antitrust L.J. 211, 212 (1959).

## **II. Factual And Procedural Background**

The three operative complaints in these cases are substantially similar and allege the existence of agreements among a franchisor and its franchisees that purportedly violate Section 1 of the Sherman Act (as well as state law, which we do not address). The plaintiffs were formerly employed by franchisees of Auntie Anne’s, Arby’s, and Carl’s Jr. *Stigar* Compl. ¶¶ 5-6 (18cv244 ECF No. 1 at 4); *Richmond* First Am. Compl. ¶¶ 5-7 (18cv246 ECF No. 5 at 4); *Harris* Compl. ¶¶ 5-6 (18cv247 ECF No. 1 at 3-4). They challenge provisions of the franchise agreements that contain



1 commitments such as: the franchisees “will not employ[] or seek to employ an  
2 employee of [the franchisor] or another franchisee.” *Stigar* Compl. ¶ 11 (18cv244  
3 ECF No. 1 at 5); *see Richmond* First Am. Compl. ¶ 13 (18cv246 ECF No. 5 at 6)  
4 (similar); *Harris* Compl. ¶ 11 (18cv247 ECF No. 1 at 5-6) (similar).

5       The complaint alleges that the franchisor and franchisee defendants in each case  
6 entered the agreements “with the common interest and intention to keep their  
7 employees’ wage costs down, so that profits continued to rise or at least not be  
8 undercut by rising salaries across the industry.” *Stigar* Compl. ¶ 15 (18cv244 ECF  
9 No. 1 at 7); *Richmond* First Am. Compl. ¶ 17 (18cv246 ECF No. 5 at 7); *see Harris*  
10 Compl. ¶ 15 (18cv247 ECF No. 1 at 6-7) (similar). Furthermore, the plaintiffs claim,  
11 “[t]he desired effect was obtained”; each “conspiracy suppressed [their] compensation  
12 and restricted competition in the labor markets in which [they] sold their services.”  
13 *Stigar* Compl. ¶ 20 (18cv244 ECF No. 1 at 8); *Richmond* First Am. Compl. ¶ 22  
14 (18cv246 ECF No. 5 at 8-9); *Harris* Compl. ¶ 20 (18cv247 ECF No. 1 at 8).

15       Currently pending are the defendants’ opposed motions to dismiss. Among  
16 other things, the parties have divergent views concerning two overarching legal issues:  
17 (1) whether franchisors and franchisees can conspire with each other within the  
18 meaning of Section 1 of the Sherman Act, and (2) which legal rule governs whether  
19 no-poach agreements among franchisors and their franchisees violate Section 1. We  
20 submit this Statement of Interest primarily to present the United States’ views on this  
21 second issue.

22  
23  
24

## ARGUMENT

### The Standards For Evaluating Whether Plaintiffs Have Stated A Claim Under Section 1 Based On No-Poach Agreements In The Franchise Context

“In order to prevail on a cause of action for violation of 15 U.S.C. § 1, a plaintiff must show (1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade under either a per se or rule of reason analysis; and (3) the restraint affected interstate commerce.” *Am. Ad Mgmt, Inc. v. GTE Corp.*, 92 F.3d 781, 784 (9th Cir. 1996). Only the first two elements are at issue in these cases.

#### A. Plaintiffs Must Plausibly Plead Concerted Action

Section 1 applies only to conduct that is a “contract, combination . . . , or conspiracy,” 15 U.S.C. § 1—what is referred to as “concerted action.” “The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade.” *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 186 (2010). To qualify as concerted action, the alleged arrangement must be (i) an agreement (ii) between two or more entities capable of engaging in concerted action. *Id.* at 189-90. Because the parties do not dispute the law applicable to (i), we do not address it in detail.

The parties do dispute (ii), whether there are here two or more entities capable of engaging in concerted action. Entities are legally capable of engaging in concerted action if the arrangement alleged to exist between them “‘deprives the marketplace of independent centers of decisionmaking’ . . . and thus of actual or potential competition.” *Id.* at 195 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984)). Determining whether this standard is met requires “a functional

1 consideration of how the parties involved in the alleged anticompetitive conduct  
2 actually operate.” *Id.* at 191.

3 The law treats certain combinations of actors as not “actually operating” as  
4 independent centers of decisionmaking (at least in the antitrust sense). *See id.* at 195-  
5 96. For example, the “internally coordinated conduct of a corporation and one of its  
6 unincorporated divisions” and “the coordinated activity of a parent and its wholly  
7 owned subsidiary” are not that of independent centers of decision-making.  
8 *Copperweld*, 467 U.S. at 770, 771.

9 The status of other combinations of actors is fact-dependent. Members of joint  
10 ventures and similar associations are generally “substantial, independently owned, and  
11 independently managed business[es]” with distinct and potentially competing  
12 interests. *Am. Needle*, 560 U.S. at 196. The actions of these types of associations are  
13 unilateral when they concern matters over which the members’ separate businesses  
14 would not otherwise act independently. For example, “if the [American Bar  
15 Association] decides to have its annual meeting in San Francisco, or to enlarge its  
16 committee on the accreditation of law schools, these decisions would be treated as  
17 unilateral” because such decisions do not eliminate the independent “market behavior  
18 of individual members.” 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law:  
19 An Analysis of Antitrust Principles and Their Application* ¶ 1477, at 338 (4th ed.  
20 2017) (*Antitrust Law*).

21 In contrast, courts have consistently applied Section 1 to the conduct of joint  
22 ventures and other cooperative arrangements when they restrain actual or potential  
23 competition among their members. For example, in 2010, the Supreme Court held  
24 that the National Football League Properties (NFLP), a separate entity formed by the

1 32 teams in the National Football League, engaged in concerted action when it made  
2 decisions about the licensing of the teams' trademarks and other "separately owned  
3 intellectual property." *Am. Needle*, 560 U.S. at 201. The Court in *American Needle*  
4 explained that the teams were acting through the NFLP, but "not like the components  
5 of a single firm that act to maximize the firm's profits." *Id.* at 201. Instead, the teams  
6 "remain[ed] separately controlled, potential competitors with economic interests that  
7 are distinct from [the jointly owned corporation's] financial well-being." *Id.*

8 *Copperweld* and *American Needle* are the relevant authority in considering  
9 whether a franchisee and franchisor should be treated as a single entity under the  
10 antitrust laws. Because franchisees are not usually corporate divisions or wholly  
11 owned subsidiaries of their franchisors, a court must not presume that they should be  
12 treated as a single entity under *Copperweld*. Instead, a court should evaluate how the  
13 alleged business relationship operates in practice with respect to the entities'  
14 economic interests. *See id.* at 195-96. This approach is consistent with Ninth Circuit  
15 case law, which even before *American Needle*'s mandate of functional analysis  
16 rejected a bright-line approach to franchisor-franchisee and similar relationships,  
17 instead making clear that the concerted-activity inquiry "requires an examination of  
18 the particular facts of each case." *Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 447  
19 (9th Cir. 1993); accord *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club,*  
20 *Inc.*, 407 F.3d 1027, 1034 (9th Cir. 2005).

21 Franchise agreements in the fast-food industry typically authorize the franchisee  
22 to use the franchisor's "trademarks, signage, and proprietary ingredients and  
23 products." *E.g.*, Order Denying Defendants' Motion to Dismiss at 2, *Yi v. SK*  
24 *Bakeries, LLC*, No. 18-5627 RJB, Doc. 33 (W.D. Wash. Nov. 13, 2008) (attached Ex.

1 A to Plaintiffs' Requests for Judicial Notice, 18cv244 ECF No. 18; 18cv246 ECF  
 2 No. 28; 18cv247 ECF No. 21) (*Yi Order*). The franchisees at times retain "significant  
 3 amounts of independence," *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d  
 4 786, 789 (S.D. Ill. 2008), such as responsibility "for the day-to-day operations of their  
 5 respective restaurants and for, among other things, employment matters," *Deslandes v.*  
 6 *McDonald's USA, LLC*, No. 17-C-4857, 2018 WL 3105955, at \*2 (N.D. Ill. June 25,  
 7 2018). Pleaded facts such as these, demonstrating that the franchisees' hiring interests  
 8 may not be perfectly aligned with those of the franchisors or other franchisees, tend to  
 9 show that a franchisor and its franchisees are legally capable of concerted action.  
 10 They suggest the absence of the "single center of decisionmaking" and "aggregation  
 11 of economic power" indicative of unilateral action. *Am. Needle*, 560 U.S. at 194, 196;  
 12 *accord Yi Order* at 5-7. In short, whether the franchisor is capable of concerted action  
 13 with the franchisees depends on whether it has "distinct" "economic interests" from  
 14 the franchisees. *Am. Needle*, 560 U.S. at 201.

### 15 **B. Plaintiffs Must Plausibly Plead An Unreasonable Restraint Of Trade**

16 To sufficiently plead the second element of a Section 1 claim, a complaint must  
 17 plausibly allege an unreasonable restraint of trade under the per se rule or the rule of  
 18 reason. Determining which rule applies requires an evaluation of both the orientation  
 19 of the alleged restraint (horizontal or vertical) and its substantive terms (here,  
 20 restraints in the category of no-poach agreements). In summary, agreements between  
 21 labor-market competitors not to poach each other's employees are per se unlawful  
 22 under Section 1 unless they are reasonably necessary to a separate, legitimate business  
 23 transaction or collaboration between the companies, in which case the rule of reason  
 24

1 applies. The rule of reason also applies to no-poach agreements between non-  
2 competitors.

3 **1. Naked no-poach agreements between competitors are per se unlawful**

4 Agreements among competitors to “divide markets” are per se unlawful.  
5 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Indeed,  
6 an agreement of this type “is a classic per se antitrust violation.” *United States v.*  
7 *Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (citing *United States v. Topco Assocs.*,  
8 405 U.S. 596, 608 (1972)). The Supreme Court has “reiterated time and time again  
9 that ‘[agreements allocating markets among competitors] are naked restraints of trade  
10 with no purpose except stifling of competition.’ Such limitations are *per se* violations  
11 of the Sherman Act.” *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49 (1990) (per  
12 curiam) (quoting *Topco Assocs.*, 405 U.S. at 608).

13 The prohibition against market division or allocation extends to agreements  
14 “between two competitors to refrain from seeking business from each other’s existing  
15 accounts.” *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1372-73  
16 (6th Cir. 1988). Such an agreement is manifestly anticompetitive because it forces the  
17 allocated customer to “face[] a monopoly seller” rather than reap the benefits of  
18 competition between sellers that would result in lower prices or better product  
19 offerings. *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994).

20 Just as an agreement among competing sellers to allocate customers eliminates  
21 competition for those customers, an agreement among competing employers to  
22 allocate employees eliminates competition for those employees. 2A *Antitrust Law*  
23 ¶ 352c, at 288-89 (4th ed. 2014); U.S. Dep’t of Justice & Fed. Trade Comm’n,  
24 *Antitrust Guidance for Human Resource Professionals* 4 (Oct. 2016),

1 <https://www.justice.gov/atr/file/903511/download>. As with other types of allocation  
2 agreements, an employee who is a victim of an allocation agreement among  
3 employers cannot reap the benefits of competition among those employers that may  
4 result in higher wages or better terms of employment. No-poach agreements among  
5 competing employers have almost identical anticompetitive effects to wage-fixing  
6 agreements: they enable the employers to avoid competing over wages and other  
7 terms of employment offered to the affected employees. As a leading antitrust treatise  
8 puts it, “[a]n agreement among employers that they will not compete against each  
9 other for the services of a particular employee or prospective employee is, in fact, a  
10 service division agreement, analogous to a product division agreement” and is  
11 “generally unlawful per se” if not negotiated as part of a collective bargaining process.  
12 12 *Antitrust Law* ¶ 2013b, at 148 (3d ed. 2012).

13 For these reasons, courts have held that plaintiffs’ well-pleaded allegations of  
14 no-poach agreements among competitors in labor markets suffice to state claims of  
15 per se violations of Section 1. In *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030  
16 (N.D. Cal. 2013), for example, the district court held that the United States sufficiently  
17 pleaded a per se violation by alleging a naked agreement between eBay and Intuit not  
18 to solicit or hire each other’s employees. The court denied a motion to dismiss, ruling  
19 that the alleged restraint was “a ‘classic’ horizontal market division” and that  
20 “[a]ntitrust law does not treat employment markets differently from other markets in  
21 this respect.” *Id.* at 1039-40. The defendants ultimately entered into a consent decree  
22 enjoining the unlawful agreement. See *United States v. eBay, Inc.*, No. 12-CV-05869-  
23 EJD-PSG, Final Judgment, Doc. 66, at 2 (N.D. Cal. Sept. 2, 2014). Likewise, in *In re*  
24 *High-Tech Employee Antitrust Litigation*, 856 F. Supp. 2d 1103, 1122 (N.D. Cal.



2012), the court held that allegations of bilateral “Do Not Cold Call” agreements among high-tech firms were sufficient to plead a per se violation of the Sherman Act.

An agreement among competing fast-food franchisees (e.g., a McDonald’s restaurant and a Burger King restaurant) not to hire each other’s employees could fall within this category. If the franchisees were actual or potential competitors for employees, such a restraint would be a horizontal agreement and, if not ancillary to any legitimate and procompetitive joint venture, would be per se unlawful. The same is true if franchisees operating under the same brand name agreed amongst themselves (and wholly independent from the franchisor), for example, not to hire any person ever previously employed by another franchisee that is a party to the agreement. Such a naked horizontal market-allocation agreements among franchisees would be subject to the per se rule. *See, e.g., Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57 n.28 (1977) (applying the rule of reason to vertical restraints imposed by franchisor on franchisees, but recognizing that “horizontal restrictions originating in agreements among the retailers . . . would be illegal *per se*” (citing *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966))).

## **2. Most franchisor-franchisee restraints are subject to the rule of reason**

The per se rule does not apply to all no-hire and no-solicitation agreements, however. The franchise relationship is in many respects a vertical one because the franchisor and the franchisee normally conduct business at different levels of the market structure. Restraints imposed by agreement between the two are usually vertical and thus assessed under the rule of reason. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).



1 For example, territorial allocation agreements are common in franchise and  
2 analogous relationships. They serve to limit geographically “the number of sellers of  
3 a particular product competing for the business of a given group of buyers.” *GTE*  
4 *Sylvania*, 433 U.S. at 54. A restriction of this type is said to restrain “intra-brand”  
5 competition because, in the parlance of a manufacturer-distributor relationship, it  
6 limits “competition between the distributors . . . of the product of a particular  
7 manufacturer.” *Id.* at 51 n.19. It often does so, however, to the benefit of interbrand  
8 competition “by allowing the manufacturer to achieve certain efficiencies in the  
9 distribution of his products” and, in “a number of ways,” “to compete more effectively  
10 against other manufacturers.” *Id.* at 54, 55. This potential procompetitive benefit is a  
11 significant one—interbrand competition “is the primary concern of antitrust law.” *Id.*  
12 at 51 n.19; *accord Am. Express*, 138 S. Ct. at 2290. Accordingly, because vertical  
13 territorial allocation agreements may have both procompetitive and anticompetitive  
14 effects, courts evaluate their legality using the rule of reason’s balancing approach.  
15 *GTE Sylvania*, 433 U.S. at 59.

16 In the franchise context, the typical no-hire or no-solicitation agreement  
17 between a franchisor and a franchisee precludes the franchisee from hiring or  
18 soliciting other franchisees’ employees. Such a typical restriction is a vertical  
19 allocation agreement “limiting the number of [employers] competing for . . . a given  
20 group of [employees],” and its “anticompetitive effects . . . can be adequately policed  
21 under the rule of reason.” *Id.* at 54, 59.

22 Even though the typical no-poach agreement between a franchisor and one of  
23 its franchisees is vertical, it could be horizontal if it restrains competition between the  
24 two interrelated entities. Specifically, a franchisor and one of its franchisees may

1 actually or potentially “compete in the market in which the relevant employees are  
 2 hired.” 12 *Antitrust Law* ¶ 2012c, at 146. If operating in the same geographic market,  
 3 they both could look to the same labor pool to hire, for example, janitorial workers,  
 4 accountants, or human resource professionals. In such circumstances, the franchisor is  
 5 competing with its franchisee, “notwithstanding that they do not compete in the  
 6 market in which their goods or services are sold.” *Id.* If a complaint plausibly pleads  
 7 direct competition between a franchisor and its franchisees to hire employees with  
 8 similar skills, a no-poach agreement between them is correctly characterized as  
 9 horizontal and, if not ancillary to any legitimate and procompetitive joint venture,  
 10 would be per se unlawful. *Id.*

### 11 **3. Alleged hub-and-spoke franchise conspiracies are likely subject to the** 12 **ancillary-restraints doctrine**

13 The plaintiffs argue that the rule of reason is inapplicable because they are not  
 14 challenging vertical restraints between the franchisor and its franchisees. Instead, the  
 15 plaintiffs argue, the challenged no-poach agreements are the products of horizontal  
 16 hub-and-spoke conspiracies among each franchisor and its franchisees. Their  
 17 argument that the per se rule applies thus hinges on whether they have adequately  
 18 pleaded hub-and-spoke conspiracies.

19 “A traditional hub-and-spoke conspiracy has three elements: (1) a hub, such as  
 20 a dominant purchaser; (2) spokes, such as competing manufacturers or distributors  
 21 that enter into vertical agreements with the hub; and (3) the rim of the wheel, which  
 22 consists of horizontal agreements among the spokes.” *In re Musical Instruments &*  
 23 *Equip. Antitrust Litig.*, 798 F.3d 1186, 1192 (9th Cir. 2015) (citing *Howard Hess*  
 24 *Dental Labs. Inc. v. Dentsply Int’l, Inc.*, 602 F.3d 237, 255 (3d Cir. 2010)); accord,

1 *e.g., United States v. Apple, Inc.*, 791 F.3d 290, 314 & n.15 (2d Cir. 2015); *In re Ins.*  
 2 *Brokerage Antitrust Litig.*, 618 F.3d 300, 327 (3d Cir. 2010); *Total Benefits Planning*  
 3 *Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 n.3 (6th Cir.  
 4 2008); *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 934 (7th Cir. 2000) (term not used).

5 To state a claim based on a hub-and-spoke conspiracy, the complaint must  
 6 plausibly plead both that there was a horizontal agreement among the “spokes,” *e.g.*  
 7 the franchisees, not to hire from each other, and that the franchisor “hub” agreed to  
 8 participate in that horizontal agreement. Allegations of parallel conduct alone do not  
 9 suffice to satisfy this requirement, and allegations of a defendant’s mere knowledge of  
 10 others’ agreement does not plausibly plead the defendant’s participation in it. *See,*  
 11 *e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *Musical Instruments*, 798  
 12 F.3d at 1193. Moreover, and contrary to the district court’s holding in *Butler*, 331 F.  
 13 Supp. 3d at 796, the mere fact that one franchisee may enforce no-hire provisions of a  
 14 vertical franchise agreement against another franchisee does not create an actual  
 15 agreement among competing franchisees. *See Twombly*, 550 U.S. at 564 (requiring  
 16 allegations of “actual agreement” among competitors to state a Section 1 claim).

17 Allegations of a hub-and-spoke conspiracy usually follow one of two fact  
 18 patterns. In the first, the plaintiff alleges that the hub “coordinate[d] an agreement  
 19 among . . . the ‘spokes,’” and the spokes agreed among themselves “‘to adhere to the  
 20 hub’s terms,’ often because the spokes ‘would not have gone along with the vertical  
 21 agreements except on the understanding that the other spokes were agreeing to the  
 22 same thing.’” *Apple*, 791 F.3d at 314 (brackets omitted) (quoting 6 *Antitrust Law*  
 23 ¶ 1402c, at 19-20 (3d ed. 2010)). This was the case in *Apple*, where the Second  
 24 Circuit agreed the United States had proved that Apple, the hub, “orchestrated a

1 conspiracy among the Publisher Defendants,” the spokes, “to raise the price of  
2 ebooks.” *Id.* at 297, 305.

3 A plaintiff pleads the second common form of a hub-and-spoke conspiracy by  
4 alleging that the spokes were the primary source of the restraint, agreeing among  
5 themselves and then convincing the hub to enforce their horizontal agreement. In  
6 *General Motors*, for example, the Supreme Court reversed a defense judgment upon  
7 finding the evidence proved that several car dealers’ associations, the spokes, agreed  
8 among themselves that no area dealer should be able to sell cars through so-called  
9 “discount houses” and successfully lobbied manufacturer General Motors, the hub,  
10 both to secure dealer commitments to that effect and enforce those commitments. 384  
11 U.S. at 132-38, 140-41, 144-46.

12 If such a conspiracy is proved, “all [of its] participants [are] . . . liable when the  
13 objective of the conspiracy was a *per se* unreasonable restraint of trade,” including the  
14 “vertical market participant.” *Apple*, 791 F.3d at 322, 323. The vertical market  
15 participant “has not only committed to vertical agreements, but has also agreed to  
16 participate in the horizontal conspiracy.” *Id.* at 325.

17 The key to the *per se* illegal hub-and-spoke conspiracy is “the existence of a  
18 ‘rim’ to the wheel in the form of an agreement among the horizontal competitors.” *Id.*  
19 at 314 n.15 (citing *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203-04 (4th Cir. 2002)).  
20 By contrast, “[a] rimless wheel conspiracy is one in which various defendants enter  
21 into separate agreements with a common defendant, but where the defendants have no  
22 connection with one another, other than the common defendant’s involvement in each  
23 transaction.” *Dickson*, 309 F.3d at 203. This “is not a single, general conspiracy” at  
24 all, “but instead amounts to multiple conspiracies between the common defendant and

each of the other defendants.” *Id.* (citing *Kotteakos v. United States*, 328 U.S. 750, 755 (1946)). Parallel but independent vertical agreements are not per se unlawful; they are subject to the rule of reason. *See id.* at 205-06.

Here, there is no indication that plaintiffs have successfully pleaded the existence of a “rim” on which to base a “hub-and-spoke” conspiracy. Even if they did, however, these cases are distinguishable from the two examples describe above because the typical franchise relationship itself is a legitimate business collaboration in which the franchisees operate under the same brand. No-poach agreements would thus qualify as ancillary restraints if they are reasonably necessary to the legitimate franchise collaboration and not overbroad. *See, e.g., Texaco Inc. v. Dagher*, 547 U.S. 1, 7-8 (2006); *L.A. Mem’l Coliseum Comm’n v. NFL*, 726 F.2d 1381, 1395-98 (9th Cir. 1984); *Aya Healthcare Servs. Inc. v. AMN Healthcare, Inc.*, No. 17cv205, 2018 WL 3032552, at \*8-18 (S.D. Cal. June 19, 2018) (offering comprehensive review of applicable law). The rule of reason is therefore likely to apply.

**4. When no-poach restrictions within a franchise system warrant rule of reason analysis, they warrant full rule of reason analysis, not a “quick look”**

When no poach restrictions within a franchise system warrant rule of reason analysis, a full rule of reason analysis is likely necessary to weigh any anticompetitive effects against potential justifications for these restraints.

Plaintiffs erroneously argue that if the Court declines to apply a per se rule, then it should conduct an abbreviated, “quick look,” rule of reason review that would remove their burden of demonstrating harm to competition in a defined antitrust market in order to satisfy their burden of proving a violation. The “quick look,”

1 however, is not a part of the foregoing analysis. If the plaintiffs have failed to plead  
2 any agreement among the franchisees, then the plaintiffs have failed to plead a  
3 horizontal agreement—and, as neither side disputes, quick-look analysis does not  
4 apply to a vertical agreement between a franchisor and a franchisee. If they have  
5 pleaded an agreement among the franchisees, then the per se rule applies if the no-  
6 poach agreement is a naked horizontal restraint, and the ancillary-restraints doctrine  
7 helps to determine whether the horizontal agreement is naked.

8       In the latter situation where a court concludes that the no-poach agreement is  
9 ancillary, then, by definition, quick look analysis is not appropriate. The “quick-look  
10 analysis” applies only in rare cases “when the great likelihood of anticompetitive  
11 effects can easily be ascertained,” and “it is not implausible” that procompetitive  
12 benefits would outweigh harm to competition. *Cal. Dental Ass’n v. FTC*, 526 U.S.  
13 756, 770, 775 (1999). Franchise no-poach agreements that are ancillary fall outside  
14 the scope of this category because they may indeed provide procompetitive benefits  
15 and promote interbrand competition. *See id.* Consequently, they do not fall into the  
16 narrow category of restraints for which “the experience of the market has been so  
17 clear, or necessarily will be, that a confident conclusion about the principal tendency  
18 of a restriction will follow from a quick (or at least quicker) look, in place of a more  
19 sedulous one.” *Id.* at 781.

20       To the extent other district courts have found otherwise at the pleading stage, *Yi*  
21 Order at 9-10; *Butler*, 331 F. Supp. 3d at 797; *Deslandes*, 2018 WL 3105955 at \*7-8,  
22 this Court should not follow their reasoning for the reasons set forth herein.

**CONCLUSION**

For the foregoing reasons, the United States respectfully recommends that the Court apply the above-discussed legal framework when it evaluates whether the plaintiffs have stated a claim that the alleged no-poach agreements violate Section 1 of the Sherman Act.

Dated: March 7, 2019.

Respectfully submitted.

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